87-1655

No. 86-5538

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROBERT C. BOBB, EDWARD J. COOPER, and CITY OF SANTA ANA,

Petitioners,

vs.

MICHAEL OSTLUND,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENT TO APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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APPENDIX B

Order of the United States District Court Dismissing Action At Pre-Trial Conference

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL OSTLUND, *Plaintiff,* vs. **ROBERT C. BOBB, CITY MANAGER; EDWARD J. COOPER, CITY ATTORNEY; AND THE CITY OF SANTA ANA,** *Defendants.*	**No. CV 84-5928-HLH** **ORDER DISMISSING ACTION AT PRE-TRIAL CONFERENCE**

This matter came on for continued pre-trial conference hearing, the Court having requested further briefing and offers of proof at the time the matter was originally set for pre-trial conference.

A brief synopsis of undisputed relevant history is as follows: Plaintiff Ostlund was a police officer employed by the City of Santa Ana with permanent job rights. He was discharged by reason of a psychological condition which affected his performance of duty as a police officer. That discharge was subsequently upheld following an administrative hearing before the Personnel Board of the City of Santa Ana. In the meantime, prior to the effective date of discharge, plaintiff filed

an application for a service-connected disability retirement with the Public Employees Retirement System (hereinafter "PERS"). Under California law, in the case of a public safety officer (policemen or firemen) entitlement to a disability retirement through PERS is determined not by PERS, but by the City. The City determined that plaintiff was not entitled to a disability retirement. Plaintiff then filed in the Orange County Superior Court an application for a writ of mandamus requiring the City to give him a due process administrative hearing on his entitlement to a disability retirement. In those proceedings, the City conceded that Mr. Ostlund was disabled, but contended that the disability was not job related. Under California law, the question of whether a disability is job related is determined by the Workers Compensation Appeals Board. Thereupon plaintiff dismissed his petition for writ of mandate, and filed a proceeding in the W.C.A.P. to determine that plaintiff Ostlund's disability was job related. Plaintiff Ostlund received from the W.C.A.B. a determination that his disability was job-related. Plaintiff renewed his claim to the disability retirement. However, at this point the City took a new position. Claiming newly discovered evidence in the W.C.A.B. proceedings, the City, through City Manager Bobb, notified PERS that it had determined that Plaintiff Ostlund, while disabled for police work for any other governmental agency, and was not, therefore, permanently disabled so as to entitle him to a disability retirement. Based on this determination, PERS has not granted the disability retirement. Without demanding an administrative hearing on the question of whether he was permanently disabled, plaintiff Ostlund then filed this civil rights action. He brings action for deprivation of civil rights under 42 U.S.C. §§1983,

1985 and 1986. The claimed violation of constitutional rights is that the City did not give him a hearing on his application for a disability retirement. Defendants are Mr. Bobb, the City Manager, Mr. Cooper, the City Attorney, and the City of Santa Ana.

The above findings are based upon the agreed facts contained in the proposed pre-trial conference order. With regard to the failure to demand a due process administrative hearing, the Court reaches this conclusion from the offer of proof it requested plaintiff to submit as a part of the pre-trial conference proceedings.

The Court determines as follows:

(1) *Plaintiff states no claim under 42 U.S.C. §§1985, 1986.*

Sections 1985 and 1986 claims must be based upon "class-based" discrimination (*Griffin v. Breckenridge*, 405 U.S. 88 (1971)). No class-based animus toward plaintiff is alleged or shown here. The §§1985 and 1986 claims are dismissed.

(2) *The individual defendants must be dismissed by reason of qualified immunity.*

The individual defendants (Bobb and Cooper) are entitled to be dismissed by reason of the qualified immunity doctrine of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). There are no appellate cases, state or federal, which hold that a city's determination that a public safety officer is not entitled to retirement benefits through PERS is subject to a due process hearing. There being no clearly established law in this respect, the individual defendants have qualified immunity. This qualified immunity doctrine is applicable in a situation where the contention is that the failure to give a hearing violated due process. (*Mims v.*

Board of Education, 523 F.2d 711 (7th Cir. 1975).) Accordingly, the action must be and is dismissed as to defendants Bobb and Cooper.

The qualified immunity doctrine does not, however, provide any shield for defendant City of Santa Ana. (*Owen v. City of Independence*, 445 U.S. 622 (1980).)

(3) *The Parratt doctrine does not apply.*

The Court asked counsel to brief the question of whether the *Parratt* case applies. (*Parratt v. Taylor*, 451 U.S. 5276 (1981).) The Court is now satisfied that it does not. Ninth Circuit interpretations of the *Parratt* doctrine make it clear that it only applies where there is a type of random unplanned action by a public officer wherein it is impossible for the state to provide a hearing in advance of the claimed deprivation of the right. (*Haygood v. Younger*, 769 F.2d 1350 (9th Circuit 1985), *Piatt v. MacDougall*, No. 82-5328, 9th Cir., October 8, 1985.)

(4) *Plaintiff is entitled to a hearing.*

Were the matter ripe for determination, the Court would hold that plaintiff has a due process right to his hearing on the question of whether he is entitled to a PERS disability retirement. While, as set forth above, there are no appellate cases on point, it seems in principle clear to this Court that a right to a disability retirement, if the facts otherwise warrant, is a vested right. (*Quintana v. Board of Administration*, 54 Cal.App.3d 1018 (1976).) It follows as a matter of both federal (*Goldberg v. Kelly*, 397 U.S. 254 (1970) and state (*Skelly v. State Personnel Board*, 15 Cal.3d 194 (1975) law that a hearing is required before such a right may be denied. Defendant states that there are not statutes or ordinances setting up the administrative mechanism by which a hearing could be held. However, it seems

clear to this Court that the right to a due process hearing cannot depend upon whether the City has established the administrative mechanism to hold such a hearing. Since state law refers to the City the decision making process as to whether a policeman or fireman is entitled to a disability pension, the duty to hold a hearing clearly devolves upon the City of Santa Ana.

(5) *Plaintiff has failed to demand a hearing.*

When this matter was discussed with counsel earlier, and defendant made the point that no hearing had ever been requested, the Court asked plaintiff to submit an offer of proof showing a demand for a hearing. In response thereto, plaintiff has set forth documents tending to show the whole background of this case. The Court assumes that plaintiff can prove all of the things that he contends he can prove in his offer of proof. The tortuous history of this case involves a number of administrative and court hearings, but that fact is not relevant to the precise question faced by this Court. When the Workers Compensation Appeals Board decided in plaintiff's favor that his disability was work connected, the City took the position that nevertheless plaintiff was not entitled to the pension by reason of lack of permanent disability. The City had theretofore not taken that position. The City justified its change of position by citing new discovered evidence, i.e., doctors' reports submitted to the W.C.A.B. Accordingly, on July 5, 1984, the City corresponded with PERS and stated to PERS its new finding that plaintiff "is able to perform the usual duties of a police officer." The City acknowledged that plaintiff was unable to perform his duties as a police officer in Santa Ana because of personality conflicts with other members of the department. Nevertheless, since the City deter-

mined that plaintiff did not have "substantial inability to perform his usual duties" as a police officer generally, he was not entitled to a disability pension.

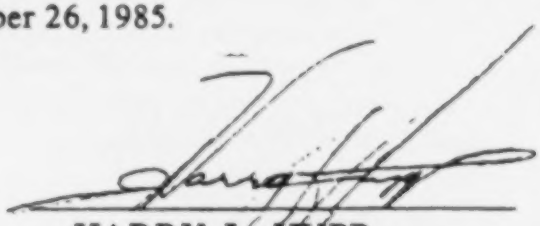
Thereafter, on July 18, counsel for plaintiff wrote the City a letter in which plaintiff vigorously protested the action of the City. Plaintiff cited the previous determination by the City that Mr. Ostlund was "substantially incapacitated," cited the finding of the W.C.A.B. that the incapacity was job related, and stated counsel's contention that as a matter of law plaintiff was entitled to his pension. However, instead of demanding a hearing, counsel stated: "Your totally inaccurate representations to PERS are tantamount to either tortious interference with my client's contractual and statutory rights and/or an intentional attempt to deprive Mr. Ostlund of his property rights to disability retirement." Counsel went on to threaten suit for damages. Whatever state law torts of interference, etc., exist, the right cognizable in this Court is the right to a hearing, which has not been demanded. Plaintiff has consistently taken the position that the City's first determination of disability, coupled with the W.C.A.B. finding of job connected disability, entitles the plaintiff as a matter of law to the disability payments without more. However, plaintiff has failed to recognize that the defendant, under the facts set forth in plaintiff's offer of proof, has made a new determination of non-disability. If plaintiff is entitled to a hearing on this, which the Court believes he is, one must be demanded. Accordingly, this action must be dismissed. Plaintiff argues that it would be futile to demand a hearing. While "futility" may on occasion excuse failure to exhaust administrative remedies and thus allow the Court to proceed to the merits, here the merits are

whether a hearing should be granted. In this situation, a demand for a hearing is required.

This document will constitute the Court's findings and determination on this action. The action is dismissed.

This Order is not intended to preclude the bringing of any new §1983 action in the event a hearing is demanded and refused.

DATED: November 26, 1985.



HARRY L. HUPP
United States District Judge

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on April 1, 1988, I served the within *Supplement To Appendix For Petition For Writ Of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
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(Original + 40 Copies)

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(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 1, 1988, at Los Angeles, California.

Claude A. Lagardere
(Original signed)